Office-Supreme Court, U.S.
FILED
JUL 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1977

In The

Supreme Court of the United States

October Term, 1984

TED BERKIC,

Petitioner,

v.

MICHAEL CRICHTON, ROBIN COOK, MARVIN MOSS, METRO-GOLDWYN-MAYER/ UNITED ARTISTS ENTERTAINMENT COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION BY RESPONDENTS MGM/UA ENTERTAINMENT CO. AND MICHAEL CRICHTON TO PETITION FOR WRIT OF CERTIORARI

LOUIS P. PETRICH
(Counsel of Record)
EDWARD A. RUTTENBERG
OF YOUNGMAN, HUNGATE & LEOPOLD
A Professional Corporation
2049 Century Park East, Suite 3110
Los Angeles, California 90067-3274
(213) 277-3333

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTES INVOLVED	1
COUNTERSTATEMENT OF THE CASE	2
A. *Partial Dismissal Of Complaint*	2
B. *Order Granting Summary Judgment*	3
REASONS FOR DENYING THE WRIT	5
I. THE COURT OF APPEALS DECISION APPLYING THE SUBSTANTIAL SIMILARITY STANDARD TO DETERMINE INFRINGEMENT NEITHER CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS NOR INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.	6
II. THE COURT OF APPEALS DECISION REFUSING TO REPLACE THE SUBSTANTIAL SIMILARITY STANDARD WITH A "BASED UPON" STANDARD TO DETERMINE INFRINGEMENT OF THE "DERIVATIVE WORKS" RIGHT GRANTED BY 17 U.S.C. § 106(2) NEITHER CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS NOR INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.	10

TABLE OF CONTENTS—Continued

Page

III. NO SPECIAL OR IMPORTANT REASONS JUSTIFY THIS COURT'S REVIEW OF THE RECORD BELOW TO DETERMINE WHETHER THE LOWER COURTS PROPERLY APPLIED THE SETTLED RULES OF SUBSTANTIVE COPYRIGHT LAW. 13

A. *Existence And Significance Of Alleged Similarities.* 13

B. *Effect Of Expert Testimony Regarding Similarity.* 14

C. *Common Error.* 14

IV. RESPONDENTS ARE ENTITLED UNDER SUPREME COURT RULE 49.2 TO AN AWARD OF ATTORNEY'S FEES AND COSTS INCURRED IN RESPONDING TO THE PETITION. 15

V. CONCLUSION 16

TABLE OF AUTHORITIES

CASES:	Page
Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946)	9, 14
Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir. 1982)	10, 14
Berkic v. Crichton, 761 F.2d 1289 (9th Cir. 1985)	1
Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661 (2d Cir. 1939), 150 F.2d 612 (2d Cir. 1945), *cert. denied*, 327 U.S. 790 (1946)	3
Gethers v. Blatty, 283 F.Supp. 303 (C.D. Calif. 1968)	7
Jason v. Fonda, 698 F.2d 966 (9th Cir. 1982), incorporating 526 F.Supp. 774 (C.D. Cal. 1981)	8
Knickerbocker Toy Co. v. Azrak-Hamway Intern., 668 F.2d 699 (2d Cir. 1982)	7
Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485 (9th Cir.), *cert. denied*, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984)	7, 12
Litchfield v. Spielberg, 736 F.2d 1352 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1753, 84 L.Ed.2d 817 (1985)	3, 5, 6, 8, 10, 15
Mazer v. Stein, 347 U.S. 201 (1954)	8
Palamini v. All State Insurance Co., 470 U.S. —, 85 L.Ed.2d 125, 105 S.Ct. 1825 (1985)	15
Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960)	14
Reyher v. Children's Television Workshop, 533 F. 2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976)	12
Rokeach v. Avco Embassy Pictures Corp., 197 U.S. P.Q. 155 (S.D.N.Y. 1978)	7
Schultz v. Holmes, 264 F.2d 942 (9th Cir. 1959)	7, 15
See v. Durang, 711 F.2d 141 (9th Cir. 1983)	3
Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d at 1157 (9th Cir. 1977)	4, 7, 8, 10, 12, 14

TABLE OF AUTHORITIES—Continued

Page

Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir. 1975) 9, 10, 14

Warner Bros. Inc. v. American Broadcasting Companies, Inc., 720 F.2d 231 (2d Cir. 1983) 3, 9, 10

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amend. I 1

STATUTES:

15 U.S.C. § 1125(a), Lanham Act § 43(a) 2

17 U.S.C. § 101 11

17 U.S.C. § 102(b) 1, 8, 10, 11

17 U.S.C. § 106(2) 5, 11, 15

28 U.S.C. § 1338(a) 2

RULES:

Supreme Court Rule 17.1 5

Supreme Court Rule 49 15

TREATISES:

1 M. Nimmer, *Nimmer On Copyright* (1985)

§ 1.10[B] 8, 11

§ 3.01 12

3 M. Nimmer, *Nimmer On Copyright* (1985)

§ 13.01 7

§ 13.01[A] 7

TABLE OF AUTHORITIES—Continued

Page

§ 13.03[A] 7

§ 13.03[B] 3

§ 13.03[C] 14

MISCELLANEOUS:

House Report No. 94-1476, *as reprinted in* 17 U.S.C.A. § 102 (1977) 11

House Report No. 94-1476, *as reprinted in* 17 U.S.C.A. § 106 (1977) 11

INTRODUCTION

Respondents,[1] MGM/UA Entertainment Co. and Michael Crichton, oppose the Petition for Writ of Certiorari. Petitioner does not, and cannot, show that any special or important reasons exist to justify this Court's review of the issues decided by the lower courts in dismissing the copyright infringement claim on motion for summary judgment.

OPINIONS BELOW

The March 11, 1985 unpublished Memorandum by the Court of Appeals, petition ("pet.") App. A-6 to -24, has since been certified for publication by that court's order of May 25, 1985 and is reported at 761 F.2d 1289 (9th Cir. 1985).

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions referred to in the petition, this case involves:

First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . ."

STATUTES INVOLVED

In addition to the statutes referred to in the petition, this case involves 17 U.S.C. Section 102(b) which pro-

---

[1] MGM/UA Entertainment Co. has the following partially owned subsidiaries and/or affiliates: Carwin Music, Inc.; Danjaq S.A.; Unitedprod S.A.; MGM/UA Entertainment Distributing Co.; MGM/UA Entertainment Releasing Co.

vides in relevant part that "in no case does copyright protection for an original work of authorship extend to any idea . . . [or] concept . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."

———o———

COUNTERSTATEMENT OF THE CASE

In February, 1978, respondent MGM/UA Entertainment Company produced a motion picture entitled "COMA," from a screenplay written by Michael Crichton.

On March 3, 1983, petitioner, Ted Berkic, ("Berkic" hereafter) commenced his civil action. Berkic's amended complaint ("complaint" hereafter) alleged that the "COMA" motion picture, and a book of the same title written by the defendant Robin Cook, infringed his copyrighted screenplay, "Reincarnation" ("Reincarnation" hereafter), and that because defendants did not give Berkic any credit in the book or movie as a creator of "COMA," the defendants misrepresented story authorship in violation of Lanham Act section 43(a), 15 U.S.C. § 1125(a).

Jurisdiction in the district court for the copyright infringement and Lanham Act claims was based on 28 U.S.C. section 1338(a).

A. Partial Dismissal Of Complaint

On April 11, 1983, defendants moved to dismiss Berkic's second claim in its entirety, on the ground that it incurably failed to allege the requisite element of secondary meaning under the Lanham Act. Defendants also

moved to dismiss the first claim to the extent that it rested upon publications made more than three years before the complaint was filed, on the grounds that such claims were barred by the statute of limitations.

On July 1, 1983, the district court granted defendants' Motion to Dismiss the second claim in its entirety, and the requested portion of the first claim.

B. Order Granting Summary Judgment

On August 4, 1983, defendants moved for summary judgment on Berkic's copyright infringement claim. For sake of argument only, defendants allowed the Court to assume "access," but asked the Court to find as a matter of law that no actionable similarity existed.[2] The supporting papers to the Motion attached copies of "Reincarnation" and the continuity[3] for "COMA." Berkic responded, in part, by filing a cross-motion seeking summary judgment on the issue of liability. The court viewed the film "COMA," read the submitted materials and

---

[2] The assumption that access existed is commonly made to simplify summary judgment motions because a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work to avoid substantial similarity. *E.g., Litchfield v. Spielberg,* 736 F.2d 1352, 1357 (9th Cir. 1984) *cert. denied,* 105 S.Ct. 1753, 84 L.Ed.2d 817 (1985); *Warner Bros., Inc. v. American Broadcasting Companies, Inc.,* 720 F.2d 231, 241 (2d Cir. 1983); 3 M. Nimmer, *Nimmer on Copyright* § 13.03[B] at 13-14 (1985) ["Nimmer" hereafter]. "Copying deleted or so disguised as to be unrecognizable is not copying." *See v. Durang,* 711 F.2d 141, 142 (9th Cir. 1983).

[3] The "continuity" is a written version of the motion picture that contains dialogue and a written description of the action prepared from the finished film. See *Dellar v. Samuel Goldwyn, Inc.,* 104 F.2d 661, 662 (2d Cir. 1939), 150 F.2d 612 (2d Cir. 1945), *cert. denied,* 327 U.S. 790 (1946).

heard oral argument before taking the cross-motions under submission.

On December 19, 1983, the district court filed Findings of Fact and Conclusions of Law and entered an Order Granting Defendants' Motion for Summary Judgment, thereby disposing of Berkic's remaining claims.[4]

The district court found that neither the general ideas nor the expression in "COMA" was substantially similar to the general ideas and protectible expression in "Reincarnation." Findings, pet., App. A-3 to -4.

Berkic's petition raises questions concerning only the claim for copyright infringement. Reviewing the propriety of summary judgment on that claim *de novo*, and viewing the inferences in the light most favorable to the plaintiff, pet., App. A-12, the court of appeals affirmed the judgment of dismissal applying the *extrinsic* and *intrinsic* tests required in the Ninth Circuit by *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d at 1157, 1162-64 (9th Cir. 1977) (*"Krofft"* hereafter). Pet. App. A-12 to -14. The court of appeals first analyzed the works under an *extrinsic* test that focused on the objective "general ideas" of the works: the characters, plot, theme, dialogue, mood, setting, pace, and sequence of events. In comparing the "actual concrete elements that make up the total sequence of events and the relationships between the major characters", it found no substantial similarity of the general ideas. Pet. App. A-18 to -19. Secondly, applying the *intrinsic* test, the likely subjective response by the intended audience, it found

---

[4] At that time, the Court also denied Berkic's cross-motion.

that reasonable minds could not differ as to the absence of substantial similarity in expression because the total concept and feel of the works was completely different: no lay observer would recognize "COMA" as a dramatization or picturization of "Reincarnation". Pet. App. A-23.

The court of appeals also rejected as "frivolous" Berkic's claim that "COMA" infringed Berkic's copyright to make derivative works of "Reincarnation" under 17 U.S.C. § 106(2) if it appeared that "COMA" was "based upon" "Reincarnation" even though no "substantial similarity of expression" existed. Pet. App. A-23 n.1.

———o———

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate the existence of "special and important reasons"[5] justifying review of the court of appeals' decision.

The only question properly raised below by petitioner was whether the "derivative works" right under § 106(2) of the 1976 Copyright Act, 17 U.S.C. § 106(2) worked a substantial change in the law to replace the substantial similarity standard with a "based upon" standard to determine infringement. The court of appeals in this case rejected the claim as "frivolous", relying upon its previous holding to the same effect in *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1753, 84 L.Ed.2d 817 (1985) ("Litchfield" hereafter). Petitioner here is represented by the same lawyers who

---

[5] Supreme Court Rule 17.1.

represented the petitioner in *Litchfield*. Faced with the overwhelming rejection of their previous theory regarding derivative works, they have invented another which seeks an equivalent result: that Congress intended to create a special rule making the use of abstract ideas from an underlying work an infringement of the right to make derivative works.

The rest of the petition never comes to any point and simply invites this Court either to write a treatise on general copyright law or to engage in a review of evidentiary issues which would have no precedential value.

I.

THE COURT OF APPEALS DECISION APPLYING THE SUBSTANTIAL SIMILARITY STANDARD TO DETERMINE INFRINGEMENT NEITHER CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS NOR INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

Petitioner argues that the courts are confused about their application of the "substantial similarity" standard. Pet. 18. He argues that some circuits apply this standard without reference to the idea/expression dichotomy whereas others apply it in light of that dichotomy. Pet. 43-53. From this he argues that a conflict exists among the circuits.

The elements of proof of copyright infringement are (1) plaintiff's ownership of the copyright, and (2) defendants' copying of protectible expression from plain-

tiff's work.[6] *Krofft, supra,* at 1162; 3 M. Nimmer, *Nimmer on Copyright* § 13.01 at 13-3, and § 13.01[A], at 13-6 (1985) (*"Nimmer"* hereafter).

"Copying" is a necessary, but not sufficient, element to prove infringement; what was copied must also constitute *expression. Krofft, supra,* at 1162-63; 3 *Nimmer* § 13.03[A] at 13-20 to -21. The three evidentiary methods of proving infringement may be charted as follows:

I	II	III
Direct evidence of copying[7]	Circumstantial evidence of copying (access and substantial similarity of ideas or expression)[8]	Circumstantial evidence of copying (striking similarity)[9]
+	+	+
Substantial similarity of expression	Substantial similarity of expression	Substantial similarity of expression

---

6 "Substantial similarity" of expression means that the amount of protectible expression copied must be more than *de minimis. See, e.g., Knickerbocker Toy Co. v. Azrak-Hamway Intern.,* 668 F.2d 699, 703 (2d Cir. 1982); *Rokeach v. Avco Embassy Pictures Corp.,* 197 U.S.P.Q. 155, 161 (S.D.N.Y. 1978) (use of isolated sentence fragments *de minimis).* However, when the alleged infringement refers to so-called non-literal comprehensive copying, "substantial similarity" also connotes a policy determination that defendant's paraphrasing of structure and detail is so comprehensive and sufficiently concrete as to borrow the "expression" and not just the "idea" of the plaintiff's work. 3 *Nimmer,* § 13.03[A] at 13-18 to -34.

7 *Landsberg v. Scrabble Crossword Game Players, Inc.,* 736 F.2d 485 (9th Cir.), *cert. denied,* 105 S.Ct. 513, 83 L.Ed.2d 403 (1984) (*"Landsberg"); Gethers v. Blatty,* 283 F.Supp. 303 (C.D. Calif 1968).

8 *Krofft, supra.*

9 *Schultz v. Holmes,* 264 F.2d 942, 943 (9th Cir. 1959).

In accordance with the idea-expression dichotomy of copyright law,[10] the requirement of "substantial similarity" is not satisfied simply by similarities in the *ideas* in the works; there must be substantial similarity in *expression* of those ideas as well. In *Krofft,* the Ninth Circuit recognized that protectible expression has two aspects: the *extrinsic,* which is capable of objective analysis, and the *intrinsic,* which depends on the audience's subjective response. Thus, the Ninth Circuit beginning with *Krofft* initiated a two-step process to analyze the substantial similarity issue: there must be substantial similarity as to both the *"general ideas"* (not synonymous with "idea") of the works in question (the *"extrinsic test"*) and the protectible expression of those general ideas (the *"intrinsic test"*). *Krofft,* 562 F.2d at 1164; *Litchfield,* 736 F.2d at 1355-57.

Thus, substantial similarity of protectible expression is a material element under each of the three alternative methods of proving infringement, and, if no reasonable jury could find substantial similarity of protectible expression, then defendants are entitled to summary judgment. *Litchfield,* 736 F.2d at 1355-1356; *Jason v. Fonda,* 698 F.2d 966 (9th Cir. 1982), incorporating 526 F.Supp. 774 (C.D. Cal. 1981) (*"Jason"*).

Thus, the only "confusion" claimed by petitioner, pet. 20-21, arises from his failure to understand or acknowledge

---

[10] The "idea-expression dichotomy" is an axiom of copyright law: protection is given only to the particular expression of ideas, never to the ideas themselves. 17 U.S.C. § 102(b); *Mazer v. Stein,* 347 U.S. 201, 217 (1954). The idea/expression dichotomy is mandated by First Amendment principles. *Krofft, supra* at 1170; 1 *Nimmer,* § 1.10[B] at 1-76 to 78.

that "similarity" has a different focus and thus meaning depending on whether the issue is (a) copying or (b) actionable similarity.

In determining whether any copying has occurred, the combination of access and *any* similarities may give rise to the inference that whatever similarities exist in the works resulted from copying. *E.g., Arnstein v. Porter,* 154 F.2d 464, 468, 472 n.18 (2d Cir. 1946).

On the other hand, even though similarities admittedly exist in a defendant's work because of copying, they are not actionable unless they occur on the level of "expression" and not just "idea". *Warner Bros. Inc. v. American Broadcasting Companies, Inc.,* 720 F.2d 231, 239 (2d Cir. 1983). Actionable similarity thus requires "substantial similarity of expression."

Consequently, as noted in *Universal Athletic Sales Co. v. Salkeld,* 511 F.2d 904 at 907 (3d Cir. 1975):

> But, substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement. As the *Arnstein* case points out, dissection and expert testimony in the former setting are proper but are irrelevant when the issue turns to unlawful appropriation. While "[r]ose is a rose is a rose is a rose", substantial similarity is not always substantial similarity.

Thus, petitioner is incorrect, pet. 43-54, to argue that a conflict exists among the circuits regarding the proper application of the standard to determine actionable similarity. The circuits referred to by petitioner are unanimous in holding that actionable similarity (1) depends upon the lay observer's reaction to the works (the "audience test") and that (2) only similarity of "expression"

as opposed to "ideas" is actionable. *Warner Bros. Inc. v. American Broadcasting Companies, Inc., supra,* 720 F.2d at 239-244; *Universal Athletic Sales Co. v. Salkeld, supra,* 511 F.2d at 907-08; *Atari, Inc. v. North American Philips Consumer Electronics Corp.,* 672 F.2d 607, 614-16 (7th Cir. 1982); *Krofft, supra,* 562 F.2d at 1163-65.

The lower courts here applied rules regarding the substantial similarity of expression which are consistent with the rules applied by all circuit courts of this country.

II.

THE COURT OF APPEALS DECISION REFUSING TO REPLACE THE SUBSTANTIAL SIMILARITY STANDARD WITH A "BASED UPON" STANDARD TO DETERMINE INFRINGEMENT OF THE "DERIVATIVE WORKS" RIGHT GRANTED BY 17 U.S.C. § 106(2) NEITHER CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS NOR INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

In the lower courts, petitioner's argument was different than that raised in the Petition. Below, he argued that something less than substantial similarity of expression would suffice to infringe the derivative work right. Berkic Brief at 35-40, *Berkic v. Crichton,* No. 84-5733 (9th Cir.). Perhaps because of the fate of this claim urged by the same counsel in *Litchfield v. Spielberg, supra,* the petition changes the argument's focus somewhat, but it comes to the same conclusion.

Petitioner now argues for the first time that the 1976 Copyright Act prohibition against protection of ideas, 17 U.S.C. § 102(b), was intended to apply only to so-called

"practical" as opposed to "artistic works". Pet. 8-10. He next argues that Congress' grant of an author's or proprietor's right to control the making of derivative works, 17 U.S.C. section 101 (definition of "derivative work") and section 106(2), was primarily designed to protect "artistic" works and not "practical" works. Pet. 10. From this he concludes that it must follow that "the derivative works' statute makes 'a string of ideas' in the aggregate the equivalent of expression." Pet. 17. This is simply petitioner's old "based upon" argument which contends that petitioner need not show the works are substantially similar as to their protectible expression.

Neither section 102(b) of the Copyright Act nor its judicial precedents distinguishes, defines or limits itself to "practical" works rather than "artistic" works. 17 U.S.C. 102(b) ("In no case . . . does copyright protection . . . extend to an idea . . ."); House Report No. 94-1476, as reprinted in 17 U.S.C.A. § 102 at 17 (1977); 1 *Nimmer*, § 1.10[B] at 1-74. Nor is the derivative works' right limited solely or primarily to "artistic" works. 17 U.S.C. § 101 (definition of "derivative work"); 17 U.S.C. § 106(2) and House Report No. 94-1476, as reprinted in 17 U.S.C. § 106 (1977). Thus, there is no statutory support for petitioner's argument that the "derivative work" rights protection was intended to expand an author's copyright monopoly to "ideas" or to anything less than "protectible expression". As Professor Nimmer notes:

> [T]he term derivative work in a technical sense does not refer to all works which borrow in any degree from pre-existing works. A work is not derivative unless it has substantially copied from a prior work. If that which is borrowed consists merely of ideas and not the expression of ideas, then although the work

> may have in part been derived from prior works, it is not a derivative work.

1 *Nimmer*, § 3.01 at 3-3. See also, *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 n. 4 (9th Cir. 1983); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). No courts have held otherwise.

Finally, petitioner's argument that a "string of ideas" may constitute protectible expression depends for its force on its practical application. If petitioner is referring in his argument to abstract "ideas", he is plainly wrong. The string of ideas:

(1) Boy meets girl;

(2) Boy loses girl;

(3) Boy and girl reconcile;

(4) Boy and girl live happily ever-after . . .

is not copyrightable. See, *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984). If petitioner defines his "string of ideas" in concrete terms (expressing the ideas by means of characters and a sequence of events in a story), his ideas then become protectible expression. But by the same turn, the scope of his protection is defined by that concrete form of expressing such ideas. *Krofft*, 562 F.2d at 1163.

III.

NO SPECIAL OR IMPORTANT REASONS JUSTIFY THIS COURT'S REVIEW OF THE RECORD BELOW TO DETERMINE WHETHER THE LOWER COURTS PROPERLY APPLIED THE SETTLED RULES OF SUBSTANTIAL COPYRIGHT LAW.

After wading through the extravagant and contradictory claims in the petition, one must conclude that petitioner's real lament is that the lower courts wrongly applied the settled rules of law to the particular facts presented, not that the courts applied the wrong rules.

Petitioner variously argues that the lower courts erred in their applications of law concerning (1) the significance of any similarities, pet. 31-37, (2) the use of expert testimony about similarities, pet. 37-39, and (3) the existence and significance of an alleged "error" common to both plaintiff's and defendants' works. Pet. 40-42.

A. *Existence And Significance Of Alleged Similarities.*

Review of the question whether the lower courts properly analyzed the subject works to determine whether substantial similarity of protectible expression *(i.e.,* actionable similarity) existed is not likely to provide any precedential value. After decades of writing leading copyright opinions, Judge Hand concluded:

> Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea', and has borrowed its 'expression'. Decisions must therefore inevitably be *ad hoc.*

Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

B. *Effect Of Expert Testimony Regarding Similarity.*

The lower courts' decisions not to follow expert testimony proffered on the actionable similarity issue was consistent with the decisions in all circuits. Since defendants in this case conceded access and copying for sake of the summary judgment — leaving only the question of actionable similarity, no expert testimony was permissible on that issue. *Arnstein v. Porter,* 154 F.2d 464, 468 (2d Cir. 1946); *Universal Athletic Sales Co. v. Salkeld,* 511 F.2d 904, 907 (3d Cir. 1975); *Atari, Inc. v. North American Philips Consumer Electronics Corp.,* 672 F.2d 607, 614 (7th Cir. 1982); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.,* 562 F.2d 1157, 1164 (9th Cir. 1977).

C. *Common Error.*

The existence or significance to be given an alleged common error in the works raises no significant issue requiring review by this Court. Moreover, the lower courts properly decided the issue in this case.

The District Court found that the common error issue was not even raised in a timely fashion. Order, 2/28/84. But, even if a single common error existed, it is only relevant to the copying issue — conceded by defendants' motion for sake of argument — not whether the works were substantially similar in their protectible expression. 3 *Nimmer,* § 13.03[C] at 13-44 and text ac-

companying note 81; *Schultz v. Holmes,* 264 F.2d 942, 943 (9th Cir. 1959).

IV.

RESPONDENTS ARE ENTITLED UNDER SUPREME COURT RULE 49.2 TO AN AWARD OF ATTORNEY'S FEES AND COSTS INCURRED IN RESPONDING TO THE PETITION.

The court of appeals appropriately described as "frivolous" the section 106(2) issue raised by petitioner. Pet. App. A-24n.1. None of the other issues raised by the petition comes any closer to presenting "special and important reasons" justifying review of the lower courts' decisions.

Respondents are mindful of the Court's reluctance to assess costs against parties or their counsel under Rule 49.2. *Palamini v. All State Insurance Co.,* 470 U.S. —, 85 L.Ed.2d 125, 105 S.Ct. 1825 (1985) (denial of petition for writ of certiorari). However, this case presents an unusually compelling case, requiring relatively little analysis.[11] Both counsel for petitioner here raised precisely the same 106(2) argument to the Ninth Circuit Court of Appeals twice—in this case and in *Litchfield v. Spielberg,* 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 1753, 84 L.Ed. 2d 817 (1985). On both occasions, that court ruled

---

[11] Petitioner's arguments are not only frivolous but they are presented in such a careless manner as to evidence the sole purpose to put defendants to the expense of opposing the petition. For example, the "quote" cited at page 59 of the petition from the *Twentieth Century* decision, 715 (erroneously cited as 715) F.2d 1327 does *not* appear in that opinion. The petition also omits to inform this Court that the *Sherry* district court opinion relied on by petitioner, pet. 27, was reversed. 753 F.2d 1565 (11th Cir. 1985).

the argument was "frivolous". Now, for a second time in six months they present the same issue to this Court.

———o———

V.

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari ought to be denied and that respondents ought to be awarded their reasonable attorneys' fees and costs.

Dated: July 9, 1985.

Respectfully submitted,

LOUIS P. PETRICH
(Counsel of Record)
EDWARD A. RUTTENBERG
YOUNGMAN, HUNGATE & LEOPOLD
A Professional Corporation
2049 Century Park East, Suite 3110
Los Angeles, California 90067-3274
(213) 277-3333

Attorneys for Respondents
MGM/UA ENTERTAINMENT COMPANY and MICHAEL CRICHTON

depictions of the small miseries of domestic life, romantic frolics at the beach, and conflicts between ambitious young people on one hand, and conservative or evil bureaucracies on the other -- are also unprotectable. These familiar scenes and themes are among the very staples of modern American literature and film. The common use of such stock cannot raise a triable issue of fact on the plaintiff's copyright claim. It merely reminds us that in Hollywood, as in the life of men generally, there is only rarely anything new under the sun. Taken separately or together, the common features of Coma and Reincarnation do not allow a reasonable inference that the works are substantially similar in their ideas.

D. The Intrinsic Test for Similarity of Expression.

Nor did the district court err in the application of the intrinsic test. We agree that Coma and Reincarnation are not substantially similar in their form of expression. Our own, independent review of the works satisfies is that they are substantially dissimilar in "the mood evoked... as a whole," see See v. Durang, 711 F.2d at 144, and in the "total concept and feel of the works," see Litchfield, 736 F.2d at 1357. We are confident that no reasonable reader or moviegoer would recognize either the book or movie Coma as a "picturization" or "dramatization" of Reincarnation. See id. at 1357.

AFFIRMED.

FOOTNOTE

1. On this appeal the plaintiff argues that the district court's partial dismissal of his copyright claim on statute of limitations grounds was erroneous. Even if the plaintiff's arguments concerning the statute of limitations are correct, it would be useless to remand the copyright action. Our affirmance of the grant of summary judgment on the substantial similarity issue precludes recovery on any part of the copyright claim. Similarly, we believe that our holding that as a matter of law there is no substantial similarity between Reincarnation and Coma disposes of the plaintiff's Lanham Act claim. "[W]ithout substantial similarity there can be no claim for reverse passing off under section 43(a) [of the Lanham Act]." Litchfield v. Speilberg, 736 F.2d 1352, 1358 (9th Cir. 1984). Finally, the plaintiff's argument that his "derivative work" copyright claim presents issues separable from his main copyright claim is frivolous. If the plaintiff cannot show a substantial similarity between the defendants' work and his own, he cannot prevail on a claim for alleged violations of his right to prepare derivative works. See id. at 1357.

AFFIDAVIT OF MAILING

I, Lawrence R. Barba, a member of the Bar of the Supreme Court of the United States and counsel of record for Ted Berkic, petitioner herein, hereby certify that on June 7, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the respondents herein, by depositing such copies in the United States Post Office, Beverly Hills, California, with first class postage prepaid, properly addressed to the Post Office address of Louis Petrich of Youngman, Hungate & Leopold, the respondents' counsel of record, at 2049 Century Park East, Suite 3110, Los Angeles, California 90067.

All parties required to be served have been served.

DATED: June 7, 1985

Lawrence R. Barba
Attorney at Law
9701 Wilshire Boulevard
8th floor
Beverly Hills, CA 90212

Proof of Service by Mail

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9701 Wilshire Boulevard, 8th floor, Beverly Hills, California 90212; that on June 7, 1984, I served the within Petition for Writ of Certiorari in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

(Original and 40 copies)

Louis P. Petrich
Youngman, Hungate & Leopold
2049 Century Park East, Suite 3110
Los Angeles, California 90067
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 1985, at Los Angeles, California.

Joanna Bloem

Joanna Bloem
(Original signed)